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IN THE

Supreme Court of the United States

October Term, 1961

NO. 532

C. D. CALBECK, DEPUTY COMMISSIONER, EIGHTH COMPENSATION DISTRICT FOR THE BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR

Petitioners

vs.

THE TRAVELERS INSURANCE COMPANY AND LIVINGSTON SHIPBUILDING COMPANY,

Respondents

AMICUS CURIAE BRIEF FOR [redacted] McGUYER IN SUPPORT OF THE APPLICATION FOR WRIT OF CERTIORARI

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MICUS CURIAE.

BRIEF FOR ~~PETITIONER~~ McGUYER IN SUPPORT OF THE APPLICATION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

REPORTED OPINIONS BELOW

The only reported opinion of the courts below is that of the Fifth Circuit Court of Appeals, which was rendered

on July 13, 1961, and is reported in 293 F. 2d 52. The opinion of the United States District Court for the Western District of Louisiana, Lake Charles Division, is appended as "Appendix A."

JURISDICTION

The judgment of United States Court of Appeals for the Fifth Circuit here sought to be reviewed was entered on July 13, 1961. On October 5, 1961, Mr. Justice Black entered an order extending the time for filing a petition for writ of certiorari to and including November 3, 1961.

The jurisdiction of this Court to review the judgment complained of by writ of certiorari is conferred by Title 28, USCA, Sections 1254(1) and 2101(c).

Constitutional Provision and Statutes Involved

Article 1, Section 8: "The Congress shall have Power . . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof."

Article 3, Section 2: "The judicial Power shall extend . . . to all cases of admiralty and maritime jurisdiction."

The Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 USCA 901, et seq. provides in its pertinent parts as follows:

"Section 902. DEFINITIONS.

When used in this chapter—

(2) The term 'injury' means accidental injury or death arising out of and in the course of employment, ...

(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part upon the navigable waters of the United States (including any drydock).

"Section 903. COVERAGE.

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

"Section 904. LIABILITY FOR COMPENSATION.

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under Sections 907-909 of this title.

"Section 920. PRESUMPTION.

In any proceedings for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter."

QUESTION PRESENTED

Whether the Deputy Commissioner has jurisdiction under the Longshoremen's and Harbor Workers' Compensation Act to make an award of compensation benefits on the claim of the widow and children of an employee who died of an injury received in the course of his employment while engaged in the construction of an uncompleted vessel afloat on navigable waters of the United States, his employer having workers engaged in maritime work.

STATEMENT OF POSITION

This is simply a brief by the McGuyers. Isabell Scott, surviving widow of Roger D. McGuyer, and Thomas Dalton and Curtis Austin, surviving minor children of Roger D. McGuyer, in support of the Application for Writ of Certorari filed herein, they being the claimants and beneficiaries under the Compensation Orders entered by the Petitioner herein, C. D. Calbeck, Deputy Commissioner, Eighth Compensation District for the Bureau of Employees' Compensation, U. S. Department of Labor.

The McGuyers adopt, in its entirety, the Application for Writ of Certiorari filed herein by the government, and pray that the Court will consider this brief in support of granting the Writ, and if the Writ be granted, it will also consider this brief on the merits of the case.

The undisputed facts are as set out above under "Question Presented."

Reasons Relied Upon For Allowance of the Writ

1. The Court of Appeals decision reversing the District Court is contrary to its own opinions in *Continental Casualty Co. v. Lawson*, 64 F. 2d 802; *Maryland Casualty Co. v. Lawson*, 101 F. 2d 732; *De Bardeleben Coal Co. v. Henderson*, 142 F. 2d 481; *Massachusetts Bonding & Ins. Co. v. Lawson*, 149 F. 2d 853; and *Avondale Marine Ways v. Henderson*, 201 F. 2d 437, aff'd. 346 U.S. 366, 74 S. Ct. 100.

2. The Court of Appeals decision reversing the District Court is contrary to the following opinions from other Circuit Courts of Appeals, *Western Boat Co. v. O'Leary*, 198 F. 2d 409 (C.A. 9); *Travelers Ins. Co. v. McManigal*, 199 F. 2d 949 (C.A. 4); *Dixie Sand & Gravel Co. v. Hol-*

land, 225 F. 2d 304 (C.A. 6); *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, 192 F. 2d 968 (C.A. 4).

3. The Court of Appeals decision reversing the District Court is contrary to the following opinions of this Honorable Court: *Pennsylvania R. v. O'Rourke*, 344 U.S. 334, 73 S.Ct. 302; *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 334, 62 S.Ct. 221; *Davis v. Department of Labor*, 317 U.S. 249, 63 S.Ct. 225; and *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, 79 S.Ct. 266.

ARGUMENT

But for the creation and existence of the so-called "twilight zone" doctrine (also known as the "local concern" or "maritime but local" doctrine), there can be little doubt but that this case would come within the Longshoremen's and Harbor Workers' Compensation Act (33 USCA 901, et seq). *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334, 73 S.Ct. 302.

The Fifth Circuit Court of Appeals, in reversing the District Court, held that this language of Section 903(a) of the Act precludes such a result:

> ". . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

In doing so, the Court relied on *Grant Smith-Porter Ship Company v. Rhode*, 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321.

The Longshoremen's & Harbor Worker's Compensation Act was born out of this Court's holding in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524.[1]

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[1] See also Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S.Ct. 438; Washington v. Dawson, 265 U.S. 219, 44 S.Ct. 302.

In *Jensen*, this Court held that a state compensation act could not constitutionally be applied to one injured while unloading the cargo of a vessel on navigable waters because, to do so, would "work(s) material prejudice to the characteristic features of the general maritime law, (or) and interfere(s) with the proper harmony and uniformity of that law in its international and interstate relations . . ." 37 S.Ct. 529.

Supremacy of the "general maritime law" in the federal government and its courts was mandatory under the Constitution. Article 3, Sec. 2, and Article 1, Sec. 8. Logic dictated the necessity for "harmony" and "uniformity" in these matters maritime. The Lottawanna (*Rodd v. Heartt*), 21 Wall 558, 22 L.Ed. 654. Axiomatic though these concepts might be in constitutional law, the fact was that people were getting hurt in an area where there was no applicable compensation law, and hurt under circumstances where damages often were not recoverable.

By 1921, the Congress not having been able to come up with a "uniform" solution, this Court was of a mind to give some relief to these unfortunate victims of our advancing mechanical and industrial technologies.

The Court of Appeals (4th) in *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, 192 F. 2d 968, described that trend and its later contraction as follows:

> "In that case (Travelers Ins. Co. v. McManigal, 139 F. 2d 949), we reviewed the decisions in border line cases of a maritime nature and endeavored *to show the tendency of the courts*, acting in the interest of humanity prior to the passage of the Longshoremen's Act, *to enlarge the jurisdiction of state compensation commissions by developing the 'local concern' doctrine so as to enable state commissions to make awards to*

> *injured men, and the opposite tendency, since the passage of the federal statute, to adhere more strictly to the traditional principle that admiralty jurisdiction depends upon the location of the activities involved upon navigable waters;* and we held that a workman who was killed in the construction of a drydock on a navigable river was engaged in maritime employment at a place within the admiralty jurisdiction so as to render his death compensable under the Longshoremen's Act, although the dry dock was not finished and prior to the accident water had been pumped out of the river at the site of the dock." (Emphasis added)

In *Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S.Ct. 89 (1921), the Court had before it the identical facts in *Jensen*, except that the injury had resulted in death and the question was the applicability of a state wrongful death statute. In this fact situation, the Court held the state statute could be constitutionally applied because "the subject is maritime (and) local in character. . . ." and that such application of the state statute ". . . will not work material prejudice to the characteristic features of the general maritime law nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." 257 U.S. at 242.

And in *Grant Smith-Porter*[2] (1921), supra, this Court held that compensation coverage for an injury sustained on an uncompleted vessel on navigable waters *could* be provided by a state law because such "would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations. . ." 42 S.Ct. at 159. This was not to

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[2] 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321

say, as the Court pointed out, that "the *general admiralty jurisdiction* (does not) extend to a proceeding to recover damages resulting from a tort committed on a vessel *in process of construction* (emphasis added) when lying on navigable waters within a state. . ." 42 S.Ct. at 159.

From this small hole in the dyke, because no one was able to formulate a definitive line of demarcation, this twilight zone became an escape route for the courts and a shopping center for litigants. *Davis v. Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 334, 62, S.Ct. 221.

It was not until *Pennsylvania R. v. O'Rourke*[3], supra, that this Court hit upon a formula for application of Longshoremen's & Harbor Workers' Compensation Act which held out real hope that at least a partial solution of the twilight zone problem was at hand. The problem had indeed been "difficult," but it was not "impossible" of solution. The solution was so simple as to make one wonder that it had been difficult at all. Moreover, the solution offered canonical certainty in many, many situations. Both the employer and employee in most instances could easily determine coverage or non-coverage with reasonable assurance. No more forum shopping by some litigant. No more need for clairvoyance on the part of most employers. And reasonable freedom for the courts of this "perplexing problem."

The solution:

> *"The statute applies by its own terms to accidents on navigable waters when the employer has any employees engaged in maritime service."* (emphasis added) 334 U.S. 339.

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[3] 344 U.S. 334, 73 S.Ct. 302

> "Section 902(4) requires the employer to pay compensation if he has 'any' employees so engaged. *If, then, the accident occurs on navigable waters, the Act must apply if the injured longshoreman was there in furtherance of his employer's business, irrespective of whether he himself can be labeled 'maritime.'*" (emphasis added) 344 U.S. 341-2.

The Fifth Circuit Court of Appeals, in this case, rejected the *O'Rourke* solution, saying that Section 903(a) of the Act froze those injured on uncompleted vessels to relief under the state act because the *Rhode* case[1], supra, had held, before enactment of the Longshoremen's & Harbor Workers' Compensation Act, that a state *could* "validly" provide compensation in such a situation.

Before continuing, it is well to note what *Rhode* did not hold. First, it did *not* hold that admiralty jurisdiction (the very heart of the Longshoremen's and Harbor Workers' Compensation Act) did not extend to an injury on new construction afloat on navigable water. Quite the contrary. Second, it did *not* hold that work on new construction afloat on navigable waters is not "maritime employment," but only that such employment had no "direct relation to navigation or commerce." These are entirely separate and distinct concepts in maritime or admiralty law.

Returning to the Court of Appeals opinion in this case. In the first place, this notion that a pre-1927 "twilight zone" case which *permits* application of a state act *freezes* every other person similarly situated to the pattern of that case flies in the face of the holding of this Court in *Davis v. Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246. As this Court said in *Hahn v. Ross Island Sand & Gravel Co.*, 320 Pac. 2d 668, 358 U.S. 272, 79 S.Ct. 266:

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[1] 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321

> *"As to cases within this 'twilight zone,' Davis in effect gave an injured waterfront employee an election to recover compensation under either the Longshoremen's Act or the Workmen's Compensation Law of the State within which the injury occurred."* (emphasis added) 358 U.S. 273.

In the instant case, though at worst a "twilight zone" case, the Court of Appeals denied the McGuyers the "election" which the doctrine clearly embraces, and forced them, notwithstanding the election they tried to make, to take their relief under the state compensation act.

Additionally, the Court of Appeals took the election away from the McGuyers notwithstanding a clear statutory presumption of jurisdiction under the Act (33 USCA 920), and in the face of this language in the Davis case[5], supra,

> "Where there has been a hearing by the federal agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There, we are aided by the provision of the federal Act, 33 USC 920, which provides in proceedings under that act, *jurisdiction is to be 'presumed in the absence of substantial evidence to the contrary.' Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. . .*" (emphasis added) 317 U.S. 256-7.

In the second place, this notion that the exclusionary language of Section 903(a) of the Act was intended by Congress to forever freeze all pre-1927 twilight zone cases under state compensation acts is contrary to other holdings

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[5] 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 276

by the Fifth Circuit Court of Appeals[6] as well as holdings of this Court.[7]

In *Continental Casualty v. Lawson*[8], in rejecting the contention that an injury on a marine railway more than one hundred feet inland from high-tide water did not come within the Longshoremen's Act, the Fifth Circuit Court of Appeals said:

> ". . . The question whether jurisdiction over a maritime tort could be asserted under the compensation laws of the states, or existed exclusively in admiralty, was an important one when the decisions were rendered in the Rhode, the Braud, and other similar cases referred to in Colonna's Shipyard Co. v. Lowe, supra; but *since the passage of this act the importance of that question has largely disappeared* . . . (64 F. 2d at 804)
>
> ". . . The elaborate provisions of the Act, viewed in the light of prior Congressional legislation as interpreted by the Supreme Court, leaves no room for doubt, as it appears to us, that *Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter.* The liability of an employer who makes provision to secure compensation to his employees is exclusive of all other liability that might be asserted by them against him.

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[6] Continental Casualty Co. v. Lawson, 64 F. (2d) 802; Maryland Casualty Co. v. Lawson, 101 F. (2d) 732; De Bardeleben Coal Co. v. Henderson, 142 F. (2d) 481; Massachusetts Bonding & Ins. Co. v. Lawson, 143 F. (2d) 853; Avondale Marine Ways v. Henderson, 201 F. (2d) 437, aff'd, 346 U.S. 366, 74 S.Ct. 100, where Mr. Justice Burton cited two of the **Lawson** cases, supra, with approval.

[7] Avondale Marine Ways v. Henderson, 201 F. (2d) 437, aff'd, 346 U.S. 366, 74 S.Ct. 100; Parker v. Motor Boat Sales, 314 U.S. 244, 62 S.Ct. 221, 86 L.Ed. 184, 1942 AMC.

[8] 64 F. (2d) 802

> State compensation laws and this compensation law of Congress are mutually exclusive of each other. The existence of the act of 1927 must be taken into consideration and given effect in determining whether under section 3 (33 USCA Sec. 902) thereof the compensation laws of the states are valid and applicable; for *state laws cannot now validly apply to a subject-matter over which Congress has exercised its exclusive jurisdiction. . .*" (emphasis added) 64 F. 2d at 805.

In the *De Bardeleben* case[9], which followed, in point of time, this Court's decision in the *Parker*[10] case, supra, the Fifth Circuit Court of Appeals said:

> "The Parker case, supra, substantially adopts this view, and such aberrations from it as the quasi legislative decision in the Davis case appears to present is only in appearance. Another of those hard cases which make bad law, *state jurisdiction was upheld there for announced reasons* having more legislative than judicial force, and *not because of any purpose to adopt a rule contrary to that which this court had announced in the Lauson case and the Parker case that followed.* As the Parker case pointed out, it is not at all necessary now to redetermine the correctness vel non of the Jensen case or of any of the brood, hatched from it, which, teetering and wavering on the line the Jensen case had drawn between state and federal jurisdiction, drew it now on this, and now on the other, side as hard cases piled up to make bad law worse. It is sufficient to say that *Congress intended the compensation act to have a coverage co-extensive with the limits of its authority and that the provision 'if recovery . . . may not validly be provided by State law' was placed in the act not as a relinquishment of any part of the*

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[9] 142 F. (2d) 481

[10] 314 U.S. 244, 62 S.Ct. 221, 86 L.Ed. 184, 1942 AMC 1

field which Congress could validly occupy but only to save the act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers. Having in mind the confused and confusing mass of quasi legislative decisions which, as such decisions always tend to do, had rendered the law almost hopelessly uncertain, *this provision was inserted to avoid, not to provide, a new basis for further judicial trimming. In the application of the act, therefore, the broadest ground it permits of should be taken. No ground should be yielded to state jurisdiction in cases falling within the principle of the Jensen case merely because the Supreme Court, before the Federal Compensation Law went into effect, did here a little, there a little, chip and whittle Jensen down* in the mass of conflicting and contradictory decisions in which it advanced and applied the 'local concern' doctrine *to save to employees injured on navigable waters, and otherwise remediless, the remedies state compensation laws afforded them.* In short, the Federal Compensation Law now in effect, the judicial tergiversations which went on before its passage no longer have point. This is what we held in the Lawson case, what the Supreme Court held in the Parker case, supra. We adhere to that holding. The judgment was right. It is affirmed." 142 F. (2) at 483-4.

In the instant case, the Court of Appeals dismissed its language in the *Lawson*[11] case and the *De Bardeleben*[12] case, saying its "expressions in some of our prior cases cannot be controlling . . . (for) . . . as the recent cases show without doubt this ignores element [2] ("if recovery for the disability or death through workmen's compensation proc-

11 64 F. (2d) 802

12 112 F. (2d) 481

ceedings may not validly be provided by State law") . . . of the coverage clause." (293 F. 2d at 58).

So far as our research shows, this decision of the Fifth Circuit Court of Appeals stands alone, in recent years at least, on these propositions: (1) that this language of 903 (a) of the Act was intended by Congress to cede to the several states exclusive jurisdiction in all pre-1927 twilight zone situations where the federal courts had permitted the application of state compensation acts, or (2) that this language of 903(a) of the Act was intended by Congress to remove from the twilight zone doctrine all those pre-1927 situations where the federal courts had permitted the application of state compensation acts.

This repudiation of its earlier decision[13] by the Fifth Circuit Court of Appeals notwithstanding that some had been cited with approval by this Court. *De Bardeleben* in O'Rourke[14]; and two of the Lawson cases by Justice Burton in *Avondale Marine Ways v. Henderson*[15].

It seems to us clear also that the Fifth Circuit Court of Appeals, in reaching this position, also misconstrued four cases decided by this Court as being in agreement with its position. *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 62 S.Ct. 221, 86 L.Ed. 184, 1942 AMC 1; *Davis v. Department of Labor*, 317 U.S. 249; 63 S.Ct. 225, 87 L.Ed. 246, 1942 AMC 1653; *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 252, 79 S.Ct. 266, 3 L.Ed. 2d 292; *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334, 73 S.Ct. 302, 97 L.Ed. 367, 1953 AMC 237.

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[13] See footnote 6.

[14] 73 S.Ct. 302, 306 footnote 7

[15] 346 U.S. 366, 74 S.Ct. 100

As to the *Davis* case, the Court said this construction "was made plain" at p. 58). As to *O'Rourke* and *Hahn*, the Court said they were "fresh reminders . . ." thereof. (at p. 58). As to *Parker*, the Court said this Honorable Court had held that ". . . the line which the Court drew in the pre-1927 days was the line which Congress adopted in 903(a), note 9, supra" (at p. 55).

It seems to us that in the *Parker* case this Court specifically overruled the very contention for which the Fifth Circuit Court of Appeals cites it as authority. To reach the conclusion that the Court of Appeals did, one must take its quotation therefrom out of the context of the opinion. That part of the *Parker* opinion not quoted by the Court of Appeals shows clearly this Court was rejecting such a narrow construction:

> "(2) The Circuit Court (116 F. 2d 789, 793) was of the opinion that even if Armistead had acted in the course of his employment, the Longshoremen's and Harbor Workers' Act would not apply because his employment was 'so local in character' that Virginia could validly have included it under a state workmen's compensation act. This proposition cannot be rested on the ground that Armistead, hired primarily as a janitor and porter, was predominantly a nonmaritime employee. For habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award was here made. Cf. Norther Coal Co. v. Strand, 278 U.S. 142, 144, 49 S. Ct. 88, 73 L.Ed. 232; Employers' Liability Assurance Corp. v. Cook, 281 U.S. 233, 236, 50 S. Ct. 308, 309, 74 L.Ed. 823. Moreover, Section 2(4) of the Act, 33 USCA, Sec. 902(4), expressly

provides for its application to 'employees (who) are employed . . . in whole or in part, upon the navigable waters of the United States.'

"If the conclusion of the Circuit Court can be supported at all, it must be on the basis that the employment, even though maritime and therefore within an area in which Congress could have established exclusive federal jurisdiction, is nevertheless subject to state regulation until Congress has exercised its paramount power. Cf. Employers' Liability Assurance Corp. v. Cook, supra, 281 U.S., page 237, 50 S. Ct., page 309, 74 L.Ed. 823. Congress having expressly kept out of the area in which 'recovery . . . may . . .validly be provided by State law,' the argument may be made that Virginia would have been unhampered in providing for compensation here.

"*The decision of this Court in Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A. 1918C, 451, Ann. Cas. 1917E, 900, *however, severs a link in this chain of reasoning. For under the holding of that case, even in the absence of any Congressional action, federal jurisdiction is exclusive and state action forbidden in an area, which, although of shadowy limits, doubtless embraces the case before us.* The basis of the decision, that Article III, Sec. 2, of the Constitution extending the judicial power of the United States 'to all cases of admiralty and maritime Jurisdiction' is tantamount to a command that no state may interfere with the harmony and uniformity of admiralty law, and that on the facts of that case recovery under a state statute would work such an interference, was rejected by four dissenting members of the Court. And when the doctrine of the Jensen case was reaffirmed in Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834, 11 A.L.R. 1145, and Washington v. W. C. Dawson & Co., 264 U.S. 219, 44 S.Ct. 302, 68 L.Ed. 646,

sharp disagreement was again expressed in dissenting opinions. We have not been called upon here, however, to reconsider the constitutional principles announced in those cases, and we are convinced that such a reconsideration is not necessary for disposition of the case before us.

"What we are called upon to decide is not of constitutional magnitude. For regardless of whether or not the limitation on the power of states set out in the Jensen case is to be accepted, it is not doubted that Congress could constitutionally have provided for recovery under a federal statute in this kind of situation. The question is whether Congress has so provided in this statute. The proviso of Section 3(a) aside, there would be no difficulty whatever in concluding it has. For the Act expressly includes within its ambit accidents 'arising out of and in the course of employment' in the case of employees engaged 'in maritime employment, in whole or in part, upon the navigable waters of the United States', and Armistead's death was the result of such an accident. *While the proviso of Section 3(a) appears to be a subtraction from the scope of the Act thus outlined by Congress, we believe that, properly interpreted, it is not a large enough subtraction to place this case outside the coverage which Congress intended to provide.*

* * * *

"There can be no doubt that the purpose of the Act was to provide for federal compensation in the area which the specific decisions referred to placed beyond the reach of the states. *The proviso permitting recovery only where compensation 'may not validly be provided by State law' cannot be read in a manner that would defeat this purpose. An interpretation which would enlarge or contract the effect of the proviso in accordance with whether this Court rejected or reaffirmed the constitutional basis of the*

Jensen and its companion cases cannot be acceptable. The result of such an interpretation would be to subject the scope of protection that Congress wished to provide, to uncertainties that Congress wished to avoid.

"[4] *The main impetus for the Longshoremen's and Harbor Workers' Compensation Act was the need to correct a gap made plain by decisions of this Court.* We believe that *there is only one interpretation of the proviso in Section 3(a) which would accord with the aim of Congress; the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the Jensen line of decisions excluded from state compensation laws.* Without affirming or rejecting the *constitutional* implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence."[16]

A reading of the *Davis* case certainly does not leave it "plain" that Section 903(a) placed an iron-curtain barrier between pre-1927 twilight zone cases where the Court permitted the application of state laws and the cases that came thereafter.

On the contrary, this Court said:

" . . . (because) the line separating the scope of the two being undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side. . . .

"There is, in the light of the cases referred to, clearly a twilight zone. . . . That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act.

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[16] 314 U.S. 223-5

"Faced with this factual problem we must give great—indeed, presumptive—weight to the conclusions of the appropriate federal authorities and to the state statutes themselves. *Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There we are aided by the provision of the federal act,* 33 USC, Sec. 920, 33 USCA, Sec. 920, *which provides that in proceedings under that act, jurisdiction is to be 'presumed, in the absence of substantial evidence to the contrary.'* Fact findings of the agency, where supported by the evidence, are made final. *Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error.* It was under these circumstances that we sustained the Commissioner's findings in Parker v. Motor Boat Sales, supra.

"In the instant case we do not enjoy the benefit of federal administrative findings and must therefore look solely to state sources for guidance. We find here a state statute which purports to cover these persons, and which indeed does cover them if the doubtful and difficult factual questions to which we have referred are decided on the side of the constitutional power of the state."[17]

Unlike the Fifth Circuit Court of Appeals, we read the *O'Rourke* case[18] as a beacon light of hope in a distressed area of the law. Indeed, the same Judge who wrote the opinion in this case, appeared to think rather highly of the *O'Rourke* doctrine when he wrote the opinion in *Flowers v. The Travelers Insurance*,[19] even though he seemed to

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[17] 317 U.S. 356-7

[18] 344 U.S. 334, 73 S.Ct. 302, 97 L.Ed. 367, 1953 AMC 237

[19] 258 F.(2d) 220

think Section 903(a) constituted some kind of limitation on *O'Rourke*. While *O'Rourke* may not solve all the problems of the "twilight zone," it can eliminate many of the problems by restoring the pre-1927 notion of what was "maritime" and what not. See *Rhode*[20] and the cases there cited. The test laid down for jurisdiction under the Longshoremen's Act is stated as follows:

> "We are clear, however, that the emphasis on the nature of respondent's duties here misses the mark. *The statute applies, by its own terms, to accidents on navigable waters when the employer has any employees engaged in maritime service.* . . . The Court of Appeals, we think, is in error in holding that the statute requires, as to the employee, both injury on navigable water and maritime employment as a ground for coverage by the Compensation Act."[21]

While the *Hahn*[22] case appears to be a departure from the firm language of *O'Rourke*[23], supra, that it was not discussed by either the majority or dissenting opinions is surprising, but does not necessarily lead to the conclusion that *O'Rourke* was to be abandoned by the Court so soon after giving it birth. And, in any event, the case certainly does not lead one to the conclusion that Section 903(a) prevents one obviously in the twilight zone from making his election between the alternative remedies provided by the state or federal acts. On the contrary, *Hahn* clearly preserves the choice given in *Davis*,[24] and which

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[20] 257 U.S. 469, 42 S.Ct. 157 at 158

[21] 344 U.S. at 339, 73 S.Ct. at 305

[22] 358 U.S. 252, 79 S.Ct. 266, 3 L.Ed. (2) 292

[23] 344 U.S. 334, 73 S.Ct. 302, 97 L.Ed. 367, 1953 AMC 237

[24] 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246, 1942 AMC 1053

choice the Fifth Circuit Court of Appeals equally clearly denies in this case.

Whatever problems *Jensen* has created, it is safe to say that its thrust and aim was to establish and preserve. A reasonable "harmony" and "uniformity" in a clearly national and international field of the law. Even the critics of *Jensen* would not now argue for a minimum of fifty different laws on the same subject in the maritime field. Such would substitute chaos for mere uncertainty.

By the time Congress enacted the Longshoremen's Act, one must concede that the aim of Congress was to enact a law that would apply "uniformly" throughout the states. Its previous experience had demonstrated that it could not adopt the many state compensation acts as a solution. To be certain that this statute would meet the test of the "uniformity" requirement of *Jensen*, what better than to say the Act should apply "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." 33 USCA 903(a). This language not only would meet the *Jensen* test, but it would save the several states from the possibility of encroachment by the federal act upon their own compensation acts in non-maritime matters.

Such an analysis of the "intent" of Congress is certainly consistent with "the legislative history, meager and scarce as it is on this point. . . ."[25] And there is nothing in that legislative history to indicate that Congress had any intention, especially in the face of the admonitions from this Court, to attempt to cede any maritime jurisdiction to the several states by delegating to them exclusive jurisdiction in all the twilight zone cases decided before 1927.[26]

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[25] 293 F. (2d) at 57

[26] See footnote 1

To have attempted to do so would have been as unconstitutional as its prior efforts along that line had been held to be. This obviously accounts for no mention of the twilight zone cases being made throughout that legislative history.

Even if we assume that Section 903(a) of the Act means what the Fifth Circuit Court holds, it would appear abundantly clear that nevertheless a state compensation act could not "validly" apply if it would prejudice the characteristic features of the maritime law or create a lack of harmony or uniformity. We think that to apply the state act in this case does indeed prejudice the characteristic features of admiralty jurisdiction and create a lack of harmony and uniformity in the maritime law in a broad field of industrial endeavor—ship building and ship repairing.

There can be no logical distinction between work on new and old construction, and the evidence in this case[27] shows there is no difference. To attempt such a distinction is to run counter to the realities of the industry. In dealing with one of the marine-railway problems[28] (repairs on boat "on a marine railway, by means of which it had been theretofore removed . . . from the navigable waters of the Miami river"),[29] the Fifth Circuit Court said:

> "In our opinion it was not the intention of Congress to provide compensation for harbor workers *only* (emphasis supplied) while they were working on ships that had been placed on floating or graven docks and to deny compensation if the same employees happened to be repairing a vessel on a marine railway. Such

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[27] R 39-42, 45, 48-51

[28] Continental Casualty Co. v. Lawson, 84 F. (2d) 802

[29] 64 F. (2d) at 803

> workmen might have been engaged on the same day in all three classes of work, since it is not unusual in a large shipyard for employees to use all three methods of taking ships out of the water for the purpose of repairing them during the same day or even at the same time."[30]

How much less can this be true in the same shipyard where both repairs and new construction are taking place, the employees working first on one and then the other, doing the same kind of work for the same rate of pay on both?

Furthermore, why a distinction in the law between new construction of a dry dock, perhaps not even on navigable water, since being on navigable water has not been compulsory in the dry dock cases, and construction work on an uncompleted vessel afloat on navigable water?[31] Even this may be going on in the same shipyard in the circumstances stated in the *Lawson*[32] case as quoted above.

Can it be that the fortuitous circumstances of the work of the employee from moment to moment shall determine whether he shall be compensated under the federal or state compensation act?

The fallacy of the argument that a distinction between injuries on new construction and injuries on repair work does "not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or unifomity of that law."[33] is

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[30] 64 F. (2d) at 805

[31] Travelers Ins. Co. v. McManigal, 139 F. (2d) 949, U. S. Casualty Co. v. Taylor, 64 F. (2d) 521, cert. den. 260 U.S. 629

[32] 84 F. (2d) 802 at 805

[33] 257 U.S. 469 at 476; 42 S.Ct. 157 at 159

easily demonstrated in this case. The same fallacy exists as to a distinction between injuries on new construction of a dry dock and new construction on a vessel afloat on navigable waters.

Assume two identical vessels, both afloat on navigable waters. One is new construction but not completed. The other is a repair job which has required stripping the vessel down to a point of construction identical with the degree of completeness of the other. On each vessel is a welder, as was the employment of deceased here, each works for the same employer, each works both on repair and new construction at various times, each has the same wage rate, and is covered by the same insurance carrier. Also, each has a wife and two children of identical ages. Assume identical explosions occur on each vessel and each of the welders receives injuries from which he dies. By the logic of the *Rhode* case, there should be no lack of uniformity in the law as applied to the two widows. But, such would not be the case. As to one widow and children, the *Rhode* case would pay (based upon the Texas Workmen's Compensation Act as is the situation here) a maximum of Thirty-five Dollars ($35.00) per week for a total of three hundred sixty (360) weeks. Asuming no remarriage, the other widow, under the Longshoremen's and Harbor Workers' Compensation Act, would be paid Twenty-eight and 35/100 Dollars ($28.35) per week plus Twenty-four and 30/00 Dollars ($24.30) per week for the two children, or a total of Fifty-two and 65/100 Dollars ($52.65) per week. This would continue for sixteen years or for about eight hundred thirty-two (832) weeks when one child would become eighteen years of age. Until the other child reached eighteen years of age, a period of about eighty (80) weeks, she would be paid Forty and 50/100 Dollars ($40.50) per

week. Thereafter, she would still be paid Twenty-eight and 35/100 Dollars ($28.35) per week for the remainder of her life. Being thirty-four (34) years of age at the time of her husband's death, she would be fifty-two (52) when the last child became eighteen. By the Commissioner's standard ordinary table of mortality she could be expected to draw this Twenty-eight and 35-100 Dollars ($28.35) per week for roughly twenty years or for about one thousand forty (1,040) weeks.

One cannot look at the realities of these assumed facts without realizing that there is considerable lack of harmony and uniformity in the laws applied to the two widows and their children, but *no* lack of uniformity as to the facts that gave rise to each of their rights to compensation.

WHEREFORE, premises considered, the McGuyers, claimants under the Longshoremen's and Harbor Workers' Act and beneficiaries of the award of the Deputy Commissioner, pray that this Honorable Court will grant the application for writ of certiorari herein, and that on the merits, the Court will reverse and render this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing brief was served upon Messrs. Cavanaugh, Hickman, Brame & Holt, 520 Weber Building, Lake Charles, Louisiana, and Mr. Louis Nelson, 319 McFaddin Building, Beaumont, Texas, Attorneys for Levingston Shipbuilding Company and The Travelers Insurance Company; and upon Mr. T. Fitzhugh Wilson, United States Attorney, P. O. Box 33, Shreveport, Louisiana, and Mr. Morton Hollander, c/o Department of Justice, Washington, D. C., Attorneys for Deputy Commissioner Calbeck, by mailing two copies to each of them.

Herman Wright

APPENDIX "A"

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

CIVIL ACTION NO. 7873

THE TRAVELERS INSURANCE COMPANY
AND
LEVINGSTON SHIPBUILDING COMPANY

v.

C. D. CALBECK, DEPUTY COMMISSIONER FOR THE EIGHTH COMPENSATION DISTRICT FOR THE BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR; ISABELL SCOTT McGUYER; THOMAS DALTON McGUYER; AND CURTIS AUSTIN McGUYER

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HUNTER, JUDGE:

McGuyer sustained a fatal injury while performing his duties as a welder aboard a drilling barge which had been launched and was afloat upon navigable waters. The barge, approximately fifty per cent complete, had not been placed in navigation. The employer, Levingston Ship Building Company, had other employees engaged in maritime employment.

The widow, in behalf of herself and her children, filed a claim pursuant to the Longshoremen's and Harbor Workers' Act for compensation by reason of the death of her husband while in the employ of Levingston.

The Deputy Commissioner at first agreed with the contention of the plaintiff (Levingston Ship Building Company and its insurer, Travelers); however, subsequently he entered a new award whereby he held the Longshoremen's and Harbor Workers' Act applicable and awarded death benefits to the widow and children of McGuyer.

This suit was instituted by the employer and its insurer to enjoin the enforcement of the award of May 13, 1960 on the ground that new construction is non-maritime

in nature, and therefore the death of deceased is compensable only under the Workmen's Compensation Act of the State of Texas. The Commissioner, defendant herein, has moved to dismiss and has filed the original report of the proceedings taken before the Deputy Commissioner on June 13, 1958, together with a certified and true copy of the compensation order filed by the Deputy Commissioner on May 13, 1959.

THE LAW

The facts are simple and not disputed. The question is one of law only and may be stated to be:

Is compensation coverage under the State (Texas) or Federal (Longshoremen's and Harbor Workers' Compensation) Act?

Travelers' position may be precisely summarized as follows: The deceased sustained his fatal injury while upon navigable waters of the United States, performing the work of a welder upon the hull of a barge that was afloat and still under construction; therefore, he was engaged at the time of his death in non-maritime work, and the State of Texas could and had validly provided a remedy which is an exclusive remedy. Plaintiff's conclusion is categorically supported by *United States Casualty Company v. Taylor, et ux*, 64 F. 2d 521, 4 C.C.A., 1933, and *Grant Smith-Porter Ship Company v. Rhode*, 42 S. Ct. 157, 257 U.S. 469, 1922.

We think the Supreme Court[1] and the Appellate Courts[2] have, by subsequent pronouncements, made it quite clear

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1 Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334, 73 S.Ct. 302.

2 Dixie Sand and Gravel Corporation v. Holland, 255 F.2d 304, 6 C.C.A., 1958; Flowers v. Travelers Insurance Co., 258 F.2d 220, 5 C.C.A., 1958.

that an employee's right under the Longshoremen's Act for an injury received on navigable waters depends not upon the particular employee's status, but rather upon whether or not his employer had "any * * * employees" engaged in maritime employment.

Here, McGuyer's death arose out of and in the course of his employment, and since Levingston had other employees engaged in maritime employment, and since McGuyer's death admittedly occurred upon navigable waters of the United States, his widow and children were entitled to compensation under the Act (Sec. 902, subpara. 2, and 903a, Title 33 U.S.C.A.; *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334, 73 S. Ct. 302; *Dixie Sand and Gravel Corporation v. Holland*, 255 F. 2d 304, 6 C.C.A., 1958; *Flowers v. Travelers Insurance Co.*, 258 F. 2d 220, 5 C.C.A., 1958.

CONCLUSION

Plaintiff's prayer for a mandatory injunction is denied. The Court has examined the record and the testimony and finds that the evidence on which the Commissioner relied amply supported his findings and required the entry of his order awarding compensation. We accept and adopt the findings of the Commissioner as being supported by substantial evidence and grant summary judgment to defendant.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this the 25th day of October, 1960.

EDWIN F. HUNTER
UNITED STATES DISTRICT JUDGE